No. 90-492

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

WISCONSIN EDUCATION ASSOCIATION COUNCIL and WEAC-PAC,

Petitioners,

v.

THE WISCONSIN STATE ELECTIONS BOARD, PETER DOHR, FREDERIC MOHS, DON MOECKER, THOMAS GODAR, MARK SOSTARICH, ROBERT TURNER, JOHN NIEBLER, EVAN ZEPPOS, KEVIN KENNEDY and THEIR OFFICERS, AGENTS, SERVANTS, and EMPLOYEES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

RESPONDENTS' BRIEF IN OPPOSITION

DONALD J. HANAWAY
Attorney General

STEPHEN W. KLEINMAIER
Counsel of Record

ALAN LEE
Assistant Attorney General
Counsel for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020

October, 1990

QUESTION PRESENTED

Whether sec. 11.29(1), Wis. Stats., which exempts from Wisconsin's Campaign Finance Act a corporation's or union's communicating of its political views to its shareholders or members also exempts communications and activities which otherwise would be considered political contributions or disbursements.

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REASONS WHY THE PETITION SHOULD BE DENIED

I. NONE OF THE COURTS BELOW REACHED THE CONSTITUTIONAL QUESTIONS BECAUSE OF THE CONTINGENT NATURE OF THE FACTS.

The petitioners have asked two state circuit courts, twice asked the state court of

appeals, and then asked the Wisconsin Supreme Court to rule on the issue which it now presents to this court. The Wisconsin Supreme Court refused to reach the constitutional claims, because the facts were "contingent and uncertain" (P-Ap. 11). The circuit court declined to "address a constitutional attack and embark on a constitutional analysis when it cannot result in a determination of how any such finding would impact on plaintiffs" (P-Ap. 27-28). The first circuit court to address the issue found "[t]here is no other way to characterize the facts offered by plaintiffs than as 'contingent'" (P-Ap. 69). The Elections Board reluctantly issued an opinion even though "[y]our opinion request does not describe the nature of the request or suggestion by the candidate to the organization. More importantly your request does not describe the nature of the communication to be made to the membership by the organization" (P-Ap. 29).

The petitioner's challenge has always been that sec. 11.29, Wis. Stats., is unconstitutional as applied to their intern program (P-Ap. 53), but the statute has never been applied to WEAC (P-Ap. 11) and WEAC "has refused to specify the nature and scope of the communications which will occur between its members and the interns." Id. Because of the petitioners' persistent failure to supply the necessary facts, the courts reviewing this case have been unable to reach the constitutional claims, have had to dismiss the case as not appropriate for declaratory judgement, or, in the case of the Wisconsin Supreme Court and the Elections Board, have been able to give only a summary of the applicable law. This court, therefore, does not have the benefit of lower court findings of fact, since no facts were ever presented to the lower courts. The petitioners are asking this court to venture where other courts have refused to tread, are asking this court to

issue an advisory opinion when other courts have refused to do so.

The petitioners' formulation of the first Question Presented misstates the issue. The statute does not limit political communication. The statute exempts certain communications from the reporting requirements and contribution limitations of Wisconsin's Campaign Finance Act. The courts presented with this case simply have held that it is impossible to determine whether a particular activity is a contribution or a disbursement without specific facts. The petitioners have persistently refused to provide those facts.

II. THIS COURT HAS ALREADY DECIDED THE CONSTITUTIONAL ISSUES.

Section 11.29 is part of Wisconsin's Campaign Finance Act. That law, like its federal counterpart, requires that political disbursements be reported and places limitations on political contributions. In

the federal act, contributions include expenditures made by any person in "cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" and "the financing by any person of dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, its campaign committees, or their authorized agents." 2 U.S.C. § 441a(a)(7)(B)(i) and (ii). Wisconsin law parallels the federal law, providing that a committee which "does not act in concert with, or at the request or suggestion of," a candidate need not report expenditures as contributions to that candidate. Sec. 11.06(7m), Wis. Stats.

In Buckley v. Valeo, 424 U.S. 1 (1976), this court held that contribution limitations and reporting requirements do not

impermissibly restrict either the contributor's freedom of political association or other first amendment rights. The court specifically noted that "[e]xpenditures by persons and associations that are 'authorized or requested' by the candidate or his agents are treated as contributions under the Act." Buckley, 424 U.S. at 24 n.25.

In United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948), this court held that the Labor-Management Relations Act of 1947 could not constitutionally restrict corporations and unions from advising their members, stockholders, or customers on political matters in the regular course of conducting their affairs. U.S. v. C.I.O., 335 U.S. at 121. Section 11.29(1) codifies U.S. v. C.I.O. That case does not stand for the proposition that union or corporation communications with members or stockholders can never be considered political contributions or

political disbursements. That was not the issue in the case. That issue, however, was decided in Buckley, and the clear answer is that the government can require the reporting of actual political contributions and disbursements. That is all that Wisconsin is doing.

The petitioners wish to use the exemption in sec. 11.29 to immunize any transaction from regulation as a contribution under any other provision of ch. 11 (P-Ap. 8). The statute does not provide that immunity. The constitution does not require that immunity.

It is clear that regulation of political activities is permissible. The two separate questions of what is political activity and whether any particular political activity is regulated depends on particular facts. Both the state and federal campaign finance laws exempt certain communications from a union to its members. But a review of even the detailed federal regulations shows that not

all such communications are exempt and illustrates the difference between a mere internal communication and a contribution to a campaign.

The Federal Election Campaign Act excludes from the definition of contribution "communications . . . by a labor organization to its members and their families on any subject." 2 U.S.C. §§ 431(7)(B)(vi) and 441b(b)(2)(A). 11 C.F.R. § 100.7(a)(3) provides: "[t]he payment by any person of compensation for the personal services of another person if those services are rendered without charge to a political committee for any purpose, except for legal and accounting services provided under 11 C.F.R. 100.7(b)(13) or (14), is a contribution." 11 C.F.R. § 114.12(c)(1) provides that a corporation or labor organization may not pay the employer's share of the cost of fringe benefits, such as health and life insurance and retirement for employes or members on leave-without-pay to

participate in political campaigns. The law then provides "[t]he separate segregated fund of a corporation or a labor organization may pay the employer's share of fringe benefits, and such payment would be a contribution in-kind to the candidate."

The federal law, like Wisconsin's, is an attempt to require full disclosure of campaign contributions and the sources of those contributions. Neither the federal law nor the state law limits a corporation's or a union's right to communicate with its members. Both laws, however, provide that when the services of an employe are provided to a campaign, those services must be reported as contributions to that campaign. "Communications" to members are exempt. The provision of services to a campaign to make those communications possible, to solicit volunteers or money on behalf of the campaign, are not exempt under either federal or state law.

11 C.F.R. § 114.3 lists disbursements which corporations and labor organizations may make to its members. One of the provisions of that law is that any material used in making partisan communications must constitute "a communication of the views of the corporation or the labor organization . . . not the republication or reproduction in whole or in part, of any broadcast, transcript, or tape or any written, graphic, or other form of campaign materials prepared by the candidate, his or her campaign committees, or their authorized agents." 11 C.F.R. § 114.3(c)(1)(ii). The issue, under both federal and state law, is whether the communication or solicitation is the organization's communication or the candidate's communication. That will always be an issue of fact that must be decided on a case-by-case basis.

Wisconsin's law does nothing more than codify this court's decision in U.S. v. C.I.O. The rest of Wisconsin's Campaign Finance Act

reflects this court's decision in Buckley. Both the Campaign Finance Act and the exception are constitutional.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DONALD J. HANAWAY
Attorney General

STEPHEN W. KLEINMAIER
Counsel of Record

ALAN LEE
Assistant Attorney General
Counsel for Respondents

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